elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money and of a similar character, *and that those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors* and are deemed therefore, and found to be, especially worthy of trust.

(emphasis added)

In that case Hamilton J found, upon the facts and upon the events which had happened, that the money in the respondent's hands was money repayable to the applicants by the terms of the undertaking.

In *Seah Choon Chye* v *Saraswathy Devi*,[3] Syed Agil Barakbah J, as he then was, stated the principle regarding solicitor's undertaking in the following words:

The general principles as regards an undertaking of this nature is that it must be given by a solicitor personally and not merely as an agent on behalf of his client. It must be given in his professional capacity as a solicitor and not as an individual.

Halsbury's Laws of England 3rd Ed at p 195 states the principle in the following words:

Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to ... a third ... person that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued it must be shown that the undertaking is given by the solicitor personally, and not merely as agent on behalf of his client; the undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

In the instant case, the letter in question was clearly written by the second defendant as an agent of the first defendant. The undertaking was not given by the solicitor or solicitors personally. Furthermore the sum stated in the said letter had not been deposited with the second defendant.

Clearly there are issues to be tried in this case and I agree with the decision of the senior assistant registrar. I therefore dismiss the appeal with costs in any event.

Appeal dismissed.

Solicitors: *Mohd Akhir & Partners*; *VK Palasuntharam*.

Reported by *Ng Sheau Jiuan*

Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C6307 OF 1985
ZAKARIA YATIM J
18 DECEMBER 1987

Civil Procedure – Judgment in default of appearance – Application to set aside – Rate of interest from date of judgment to date of realization stated as 17.75% pa in judgment – Whether rate can be claimed by plaintiff – Statutory limit of 8% pa in O 42 r 12 of the Rules of the High Court 1980 – Effect of – Whether court should correct the judgment or set aside – Rules of the High Court 1980, O 42 r 12

Civil Procedure – Judgment in default of appearance – Application to set aside – Delay in filing application not a primary ground for dismissing application – Existence of a defence on the merits the more important consideration

This was an application by the fourth defendant to set aside a judgment entered in default of appearance against him on 29 November 1985. The fourth defendant/applicant contended that the judgment entered against him was an irregular judgment because the award of 17.75% pa rate of interest from date of judgment till judgment was satisfied exceeded the limit of 8% pa laid down under O 42 r 12 of the Rules of the High Court 1980. The plaintiff/respondent submitted that O 42 r 12 gave the court the discretion to allow interest at the rate of less than 8% pa or more than 8% pa. It also contended that there was inordinate delay on the part of the applicant in filing the application to set aside.

Held, allowing the fourth defendant's application: (1) Section 16(1) of the Courts of Judicature Act 1964 is an enabling provision. It does not confer any power on the High Court regarding interest. It only confers power on the Rules Committee to make rules to regulate the rate of interest payable on all debts. The Rules Committee had already made the rule pursuant to s 16(1) and the rule is contained in O 42 r 12 of the Rules of the High Court 1980. It is clear from the rule that a plaintiff cannot claim, from the date of judgment, that interest rate as agreed upon between the parties if such rate is more than 8% pa.

(2) The amended O 42 r 12, which came into force on 12 December 1986, allowed a plaintiff to claim interest from date of judgment until judgment is satisfied at a rate agreed upon between the parties even though such interest rate is more than 8% pa. However, the amended rule does not apply in the present case as judgment in default of appearance was entered against the applicant on 29 November 1985 when the old r 12 was still in force.

(3) According to the rule in *Armitage* v *Parsons*,[5] if the rate of interest of 17.75% pa had been entered by mistake or if the solicitor's clerk had inadvertently filled the wrong figure and the amount involved was significantly small, the mistake could be corrected and the judgment in default should not be set aside by the court. However, in the instant case, there was no mistake or accidental slip in putting the rate of interest at 17.75% pa and if the rate of interest is calculated on the basis of the principal sum of $3m, the amount would be significantly large. There is therefore no question of the court varying the rate of interest and the applicant has a right ex debito justitiae to have the judgment set aside.

(4) Delay should not be a ground for dismissing an application to set aside a judgment in default unless there is no defence on the merits. The important consideration in an application to set aside a judgment in default is whether there is a defence on the merits. The question of delay is a secondary matter.

(5) The conduct of the applicant was at all times bona fide. There was no unreasonable delay in the filing of the application to set aside the judgment in default.

Cases referred to

1 *Supreme Finance (M) Bhd* v *Koo Sin Ken* [1987] 1 MLJ 296 (folld)
2 *Sim Lim Finance Ltd* v *Pelandok Enterprises Pte Ltd & Anor* [1981] 1 MLJ 280 (folld)
3 *Lim Eng Kay* v *Jaafar bin Mohamed Said* [1982] 2 MLJ 156 (refd)
4 *American International Assurance Co Ltd* v *Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95 (distd)
5 *Armitage* v *Parsons* [1908] 2 KB 410 (distd)
6 *Hughes* v *Justin* [1894] 1 QB 667 (refd)
7 *Hong Leong Equipment Sdn Bhd* v *Manjo Development Sdn Bhd & Anor* [1986] 1 CLJ 417 (refd)
8 *Atwood* v *Chichester* (1877-78) 3 QBD 722 (refd)
9 *Evans* v *Bartlam* [1937] AC 473 (folld)
10 *Ladup Ltd* v *Siu* (1984) 87 Law Society's Gazette 283; The Times 24 November 1983 (refd)
11 *Vann* v *Awford & Ors* The Times 23 April 1986 (refd)

Legislation referred to

Civil Law Act 1956 (1972 Revised) s 11
Courts of Judicature Act 1964 (1972 Revised) ss 16(1), 17, 25(2), item 7 of the Schedule
Rules of the High Court 1980 O 42 r 12
Rules of the Supreme Court 1957 O 42 r 16

Narayanan Chandran for the plaintiff.
KS Narayanan for the fourth defendant/applicant.

Cur Adv Vult

Zakaria Yatim J: This was an application by the fourth defendant seeking the order of the court that the judgment entered in default of appearance against him on 29 November 1985 and in execution of the said judgment issued thereon be set aside. The applicant also asked that he be at liberty to defend in the action by entering an appearance within three days and filing his statement of defence within fourteen days of entering the said appearance.

The application was heard in chambers. After hearing the submissions of both counsel for the plaintiff and for the fourth defendant, and after considering the affidavits and the documentary evidence, I made the following order on 12 December 1986:

(1) Judgment in default of appearance entered against the fourth defendant be set aside.
(2) The fourth defendant was allowed to file his defence within fourteen days of the date of the order.
(3) The plaintiff paid the costs of the application to the fourth defendant in any event.

On the application of the plaintiff, I adjourned the matter to open court for further argument.

The plaintiff's claim against the defendants, including the fourth defendant, was (a) for a sum of $3,000,000; (b) interest at the rate of 2% above the prescribed rate of 15.75%, that is, 17.75% on yearly rests from 1 February 1985 to date of final settlement; (c) interest on the judgment sum at 8% pa until final payment; (d) costs; and (e) plaintiff's solicitors' legal charges in the sum to be agreed by all the defendants or to be taxed by the appropriate officer of the court.

In the statement of claim, the plaintiff averred that by a loan agreement made on 3 November 1983 between the first defendant and the plaintiff, the first defendant had covenanted to repay the sum of $3,000,000 loaned by the plaintiff to the first defendant on terms and conditions set out in the loan agreement. The plaintiff also averred that by a letter of guarantee dated 27 October 1983 the second, third and fourth defendants had, in consideration of the plaintiff giving credit facilities to the first defendant under the loan agreement, jointly and severally guaranteed payment on demand all moneys due and owing by the first defendant to the plaintiff as at the date of the said guarantee and all moneys that became due and payable on credit facilities afforded pursuant to the said guarantee, up to the extent of $3,000,000. The plaintiff further averred that the second, third and fourth defendants had, under the said guarantee, convenanted to pay interest at such rate as the plaintiff may, by notification, impose from time to time, and costs incurred by the plaintiff in the proceedings for the recovery under the said guarantee. The plaintiff had, pursuant to the loan agreement and the said guarantee, granted a credit facility to the first defendant by way of a term loan in the sum of $3,000,000 on the terms and conditions of the loan agreement. The first defendant failed to make repayments as per the loan agreement and was on 31 January 1985 owing the plaintiff a sum of $3,523,383.98 representing the principal sum and interest accrued thereon up to that date. The plaintiff caused a demand to be made on the first defendant pursuant to the loan agreement and on the second, third, and fourth defendants pursuant to the said guarantee, by letters dated 8 April 1985 demanding payment of the sum loaned and guaranteed respectively, together with all interest and costs. According to the plaintiff the defendants failed to pay the plaintiff the said sum or any part thereof.

On 29 November 1985, the plaintiff entered judgment in default of appearance against the fourth defendant. According to this judgment, the fourth defendant was required to pay to the plaintiff:

(a) the sum of $3,000,000;
(b) interest at the rate of 2% above the prescribed rate of 15.75%, ie 17.75% on yearly rests from 1 February 1985 to date of final settlement;

(c) costs of $225;
(d) plaintiff's solicitors' legal charges in the sum to be agreed by the defendant or to be taxed by the appropriate officer of the court.

Mr Narayanan, counsel for the applicant, submitted that the judgment entered against his client was an irregular judgment because the amount in the judgment was more than that allowed by law as far as interest was concerned. He was referring to the 17.75% interest on the principal sum up to the date of final settlement. According to Mr Narayanan, under O 42 r 12 of the Rules of the High Court 1980, the plaintiff was allowed only 8% interest from the date of judgment to the date of realization. The applicant, in para 4(b) of his affidavit in support of the application, referred to the judgment which gave interest at 17.75% on yearly rests from 1 February 1985 to the date of final settlement. In the same para, the applicant stated that the interest to be calculated from the date of judgment until judgment was satisfied should not exceed 8% pa. The applicant averred that the judgment was an irregular judgment and ought to be set aside as the judgment had been given for a sum in excess of what the Rules of the High Court allowed.

Mr Chandran, counsel for the plaintiff/respondent, submitted that the judgment was a regular judgment. According to him, O 42 r 12 gave the court the discretion whether to allow interest from the date of judgment until the judgment was satisfied at the rate of less than 8% or more than 8%.

It was not in dispute that up to the date of judgment, the respondent was entitled to claim interest at the rate agreed upon between the parties. In the absence of agreement, the court has the discretion to determine the rate of interest. The position regarding pre-judgment period is clearly stated in s 11 of the Civil Law Act 1956 (1972 Revised). The section states:

> In any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section –
>
> (a) shall authorize the giving of interest upon interest;
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

The issue before the court was whether the respondent was entitled to enter judgment and ask the applicant to pay interest at the rate of 17.75% from the date of judgment to the date of realization.

Mr Chandran argued that under para 2.04 of the loan agreement, interest was agreed upon between the respondent and the first defendant. He also referred to the letter of guarantee in which interest was also stated. According to him, his client was entitled to claim the interest at the rate of 17.75% from the date of judgment to the date of realization. In support of his argument, he relied on s 16(i) and the proviso to s 25(2) of the Courts of Judicature Act 1964 (1972 Revised). Section 16(i) states:

> Rules of Court may be made for the following purposes...
>
> (i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the court:
> Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties ...

Section 16(i) is an enabling provision. It does not confer any power on the High Court regarding interest. It only confers power on the Rules Committee to make rules to regulate the rate of interest payable on all debts. Before the rules can come into force, it must be published in the gazette and it must also be laid before the Dewan Raayat (see s 17). The Rules Committee had already made the rule pursuant to s 16(i) and the rule is contained in O 42 r 12 of the Rules of the High Court 1980 in the following words:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

It is clear from the rule quoted above that a plaintiff cannot claim, from the date of judgment, that interest rate as agreed upon between the parties if such interest rate is more than 8% pa. Lee Hun Hoe CJ (Borneo) in his judgment in *Supreme Finance (M) Berhad* v *Koo Sin Ken* [1] said, 'O 42 r 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement... We are also of the view that the appellants are entitled to retain their security until they were paid the principal sum and specified rates of interest up to the date of judgment but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% pa under O 42 r 12.' The above rule (the old rule) was amended last year and came into force on 12 December 1986 (the new rule). With effect from 12 December last year, a plaintiff may claim interest from the date of judgment until the judgment is satisfied at a rate agreed upon between the parties even though such interest rate is more than 8% pa.

I shall next turn to s 25(2) which states:

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that *all such powers shall be exercised in accordance with any written law or rules of Court* relating to same.

(emphasis added)

The additional powers referred to in s 25(2) are contained in item 7 of the Schedule and it states:

Power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court.

Unlike s 16(i), s 25(2) read with item 7 of the Schedule confers the court with the power 'to direct interest to be paid on debts including judgment debts'. But the power can only be exercised in accordance with any written law or rules of court. There is no written law in this respect but the relevant rule of court is O 42 r 12. For the purpose of the present case the amended r 12 of O 42 does not apply as judgment in default of appearance was entered against the applicant on 29 November 1985 when the old r 12 was still in force.

It is clear from the old r 12 of O 42, one is not entitled to interest at a rate of more than 8% pa from the date of judgment up to the date of realization (see the *Supreme Finance* case[1]). In Singapore, O 42 r 12 is identical with our old r 12 of O 42. In construing this rule, Wee Chong Jin CJ, in *Sim Lim Finance Ltd* v *Pelandok Enterprise Pte Ltd & Anor*[2] said:

... in my judgment, they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8% prescribed under O 42 r 12 ...

In the *Sim Lim Finance case*,[2] it was also argued that s 18(2) (similar to our s 25(2) of the Courts of Judicature Act) read with para 7 of the First Schedule (similar to para 7 of the Schedule to our Act) gave the court discretionary power to direct interest to be paid on a judgment debt and that in cases where there was agreement or a covenant between the parties to pay interest at an agreed rate as well after or before any judgment, the court had a discretionary power to order payment of interest at a rate exceeding the statutory rate of 8% pa prescribed under O 42 r 12. Wee Chong Jin CJ rejected this argument. In his judgment, the learned Chief Justice said:

Section 18(2) of the Supreme Court of Judicature Act read with para 7 of the First Schedule thereto enables the court to direct interest to be paid and s 80(2)(j) (identical to s 16(i) of our Courts of Judicature Act) gives power to the Rules Committee to make rules of court regulating the rate of interest payable on, inter alia, judgment debts. Order 42 r 12 prescribed the maximum rate of 8% pa payable on every judgment debt and it has the force of law.

(words in brackets added)

The 8% interest is the maximum rate of interest permitted under the rule. The court, however, has the discretion to award interest at a lesser rate. In *Lim Eng Kay* v *Jaafar bin Mohamed Said*,[3] the Federal Court confirmed the decision of the High Court awarding 6% interest after the date of judgment in an accident case.

The cases referred to so far are consistent with one another in that under the old r 12 O 42, the court can only award interest from the date of judgment until realization at the rate not exceeding 8%. My attention was drawn to a case where the court allowed interest at the rate of 11% until realization. The case, *American International Assurance Co Ltd* v *Union Builders (Malaysia) Sdn Bhd*,[4] was decided by the Federal Court in 1971. The appellants were chargees of certain lands on the security of which the respondent was given a loan of $1,250,000 bearing interest at 11% pa. The respondent defaulted in payment of a number of instalments and interest and notice of default was given under s 294 of the National Land Code. Subsequently, an order for the sale of the lands was made by the High Court to recover the sum due to the appellants together with interest at the rate of 11% pa up to the date of the order and further interest at the rate of 6% pa to the date of realization. The Federal Court held that as the appellants' claim as chargees was not on the covenant but in exercise of their remedy against a chargor in default there could not be any merger in the judgment and the appellants were therefore entitled to interest at the agreed rate of 11% until realization of the security.

It will be noted that in the *American International Assurance* case,[4] the Federal Court applied the merger principle. The court, however, made no reference to the Supreme Court Rules 1957. In my opinion, under O 42 r 16 of the Supreme Court Rules, the court had the power to award an agreed *rate* of interest higher than the statutory rate of interest as provided in the Supreme Court Rules. Order 42 r 16 of the Supreme Court Rules states:

Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of six per cent per annum, from the time when the judgment or order was entered or made, provided that in cases where there is an agreement between the parties that more than six per cent interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed.

The *American International Assurance* case[4] was decided in the light of the provisions of the Rules of the Supreme Court 1957 in particular O 42 r 16 and, therefore, cannot be used as an authority in the present case.

Having considered the sections relied upon by Mr Chandran, and having considered the authorities above, I

am satisfied that Mr Chandran's arguments had no merit whatsoever.

In the circumstances, the respondent had entered judgment in default of appearance against the applicant with interest rate from the date of judgment to the date of realization far in excess of the statutory rate of 8% pa.

Mr Chandran asked the court to vary the rate of interest, presumably to bring it down to the statutory rate of 8% pa. In my opinion, if the figure had been entered by mistake or if the solicitor's clerk had inadvertently filled the wrong figure and the error had not been discovered, then there was clearly an accidental slip which should be corrected. Where there was such a mistake and the amount involved was insignificantly small, the mistake could be corrected and the judgment in default should not be set aside (see *Armitage* v *Parsons*[5]). In the instant case I do not think there was a mistake or accidental slip in putting the rate of interest at the rate of 17.75% pa. It was stated in the statement of claim; it was stated in the judgment in default and indeed Mr Chandran strenuously argued before me to justify that the respondent was entitled to that rate of interest. The respondent in fact deliberately included interest at the rate of 17.75% from the date of judgment to date of realization. If this rate of interest is calculated on the basis of the principal sum of $3,000,000 the amount would be significantly large. The principle in *Armitage* v *Parsons*[5] does not apply in the present case and and there is no question of the court varying the rate of interest at this stage.

Since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% pa, the applicant has a right ex debito justitiae to have the judgment set aside (see *Hughes* v *Justin*[6]).

At the hearing of the application in chambers, Mr Chandran referred to para 2 of the applicant's affidavit in support of the application and said, 'I am not taking point on delay. I think he has given reasons ...' When the matter was adjourned to open court for further argument, Mr Chandran, however, submitted, 'It took applicant ten months to set aside. This is inordinate delay.' Mr Narayanan interrupted him and said, 'I am taken by surprise on question of inordinate delay.'

The question for the court to consider was whether there was inordinate delay and if there was inordinate delay in filing the application, whether such delay was fatal to the application. Mr Chandran relied heavily on the decision in *Hong Leong Equipment Sdn Bhd* v *Manjo Development Sdn Bhd & Anor*.[7] In that case it was stated that 'the court will expect the application to set aside to be filed promptly and if not the explanation if any for the delay would be relevant.' In my opinion, it is not a rule or a principle of law that an application to set aside judgment in default must be filed promptly. Where no irreparable wrong would be done to the plaintiff who had obtained judgment in default, lapse of time was not a bar to an application to set aside (see *Atwood* v *Chichester* [8]). In *Evans* v *Bartlam*,[9] Lord Atkin said: 'The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.' Delay, therefore, should not be a ground for dismissing an application to set aside a judgment in default unless there is no defence on the merits. The important consideration in an application to set aside a judgment in default is whether there is a defence on the merits. The question of delay is a secondary matter (see *Ladup Ltd* v *Siu*[10]).

In the present case, judgment in default of appearance was entered against the applicant on 29 November 1985. The application to set aside the judgment was filed on 3 September 1986. There was a delay of slightly over nine months. In his affidavit in support of his application, the applicant averred that when the writ of summons was served on him, he forwarded it to his then solicitors in Penang for their action but due to errors and difficulty in communication, his appearance to the said writ was not filed in time and the plaintiff consequently obtained judgment in default against him. The applicant further averred that by letter dated 7 April 1986, the solicitors for the plaintiff informed the applicant about the said judgment and that if payment was not received by the plaintiff, a bankruptcy notice would be issued against the applicant. At the time the said letter was sent to the applicant's office, the applicant was not in the country, as he was undergoing medical treatment abroad. According to the applicant, his office informed the plaintiff's solicitors to hold matters in abeyance till the applicant returned, which was about three months thereafter. The applicant also averred that when he returned from abroad, he came to know that the first defendant, as borrower, and the second defendant, as guarantor, had been served with the same writ, and that the plaintiff had taken out an O 14 application against the first and second defendants which had been set down for hearing on 23 October 1986. The applicant said that he then engaged Messrs Ng Ek Teong & Partners, who were acting as solicitors for the second defendant, to also act for the applicant in this matter and to take steps to set aside the judgment in default obtained against him in view of the fact that the said solicitors were also defending the second defendant as guarantor and had been appraised of the full and complete facts and background of the loan arrangement. Finally, the applicant averred that he had at all times intended to appear and defend the said action, but due to unforseen circumstances the judgment in default was obtained against him.

From what was stated in his affidavit, I found that it was not through his negligence that the judgment was obtained against him. I also find that the conduct of the applicant was at all times bona fide. Finally I find no unreasonable delay in the filing of the application to set aside the judgment in default in view of the circumstances in this case.

Apart from the question of delay, Mr Chandran also submitted that there was nothing in the applicant's affidavit in support of the application that contained an explanation as to why no action was taken from the date of service to the date of judgment. He added that no good reasons were given as to why appearance was not entered. He further submitted that the fourth defendant had not come before this court with clean hands. In support of his submission, he again cited the *Hong Leong* case.[7] In *Evans* v *Bartlam*,[9] Lord Atkin emphasized, at p 480 of his judgment, that there was no rule that the applicant must satisfy the court that there was a reasonable explanation why judgment was allowed to go by default. But whatever reason, if any, for allowing judgment and thereafter applying to set it aside, was one of the matters to which the court would have regard in exercising its discretion to set aside judgment in default. In my opinion, if the applicant failed to give an explanation why he neglected to enter appearance, such failure should not be a ground to dismiss his application. The court may, however, order him to pay costs. In *Evans* v *Bartlam*,[9] Lord Wright, in his judgment at p 489 said: 'The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule *his fault (if any) in that respect can be sufficiently punished by the terms as to costs* or otherwise which the court in its discretion is empowered by the rule to impose.' (emphasis added). Recently, the English Court of Appeal decided that where a defendant who deliberately misled the court by lying about the reason for not defending an action, he was nevertheless entitled to have the judgment in default of appearance set aside because he was able to show that there were triable issues arising out of the plaintiff's claim. The court, however, allowed him to defend the action on stringent conditions as to his paying security and paying costs (see *Vann* v *Awford & Others*[11]).

From the applicant's affidavit in support of the application, I was satisfied that he had a valid explanation as to why appearance was not entered after the writ was served on him. His conduct was very prompt and it was not his fault that appearance was not entered. He should not, therefore, be asked to pay costs. On the other hand, since the judgment was an irregular judgment, it was the plaintiff who should pay the costs.

For the reasons stated above, I confirmed the order I made in chambers on 12 December 1986 and ordered that the plaintiff pay the applicant the costs of further argument.

Order accordingly.

Solicitors: *Adnan Sundra & Low*; *Ng Ek Teong & Partners*.

Reported by *Ng Sheau Jiuan*

Sugumar Balakrishnan v The Chief Minister of the State of Sabah

HIGH COURT (KOTA KINABALU) – ORIGINATING MOTION NO 20 OF 1987
ABU MANSOR J
11 DECEMBER 1987

Administrative Law – Prohibitory order – Leave to apply for – Application for – Power of state authority to publish in federal gazette – Whether prohibitory order can be issued against state authority – Whether leave should be granted if substantive motion is bound to fail – Rules of the High Court 1980, O 53 – Government Proceedings Ordinance 1956, s 29(2) – Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984, para 2

The applicant, by an ex parte notice of motion, applied for an order that leave be granted under O 53 of the Rules of the High Court 1980 to apply for an order of prohibition to prohibit the respondent from publishing in the federal gazette, pursuant to para 2 of the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984, a notification to the effect that the Immigration and Passport (Exemption) Order 1984 shall not apply to the applicant. If allowed to be published, the notification would mean that the applicant can only enter Sabah using a proper passport whereas under the Immigration and Passport (Exemption) Order 1984 he had enjoyed the privilege of entering Sabah by producing only his national registration card.

Held, dismissing the application: (1) Paragraph 2 of the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984 speaks of the power being the power of the state authority to publish in the federal gazette. The applicant's action is in truth against the state authority or the state government of Sabah.

(2) Section 29(2) of the Government Proceedings Ordinance 1956 governs the power of the court to issue a prohibition against the government. Under s 29(2), it is clear that the court is precluded from granting the order of prohibition as the effect of granting such an order against the present respondent would be the same as if granting it against the state authority or the state government.

(3) The granting of the application for leave to apply for an order of prohibition is within the court's discretion to give. However, if the applicant has no chance of succeeding in his application in the subsequent substantive motion if leave is granted, it is only right and proper that leave be refused to prevent a party being put to unnecessary expense in frivolous or vexatious actions or in continuing an action which was certain to fail.